U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 29 May 2003

Case No. 2002-LHC-0084
2002-LHC-0085

OWCP No. 5-110005
5-110286

In the Matter of

JOHN H. HALL, Jr.,
Claimant
v.

CERES MARINE TERMINALS,
Employer

Appearances:
Gregory Camden, Esq., for Claimant
Robert A. Rapaport, Esq., for Employer

Before:
RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for temporary partial disability from an injury alleged to have been suffered by Claimant, John Hall, covered by the Longshore and Harbor Workers' Compensation Act, *as amended*, 33 U.S.C.A. §§ 901 *et seq*. (Hereinafter "the Act"). Claimant alleges that he was injured while driving a hustler when his seat fell apart and catapulted him into the windshield while employed by Employer; and that as a result he is suffering from a back condition.

The claim was referred by the Director, Office of Workers' Compensation Programs to the Office of Administrative Law Judges for a formal hearing in accordance with the Act and the regulations issued thereunder. A formal hearing was initially scheduled on April 15, 2002. The parties instead submitted stipulations of facts and an application for award of a compensation order. A dispute arose from those stipulations as to whether or not Claimant was entitled to continuing payments of temporary partial disability. An interim order was issued on May 28,

2002, ordering the Employer to pay various periods of temporary partial disability benefits continuing through April 5, 2002. A formal hearing was held on June 28, 2002. (TR).[1] Claimant submitted thirteen exhibits, identified as CX 1 through CX 13. CX1 through CX 4 and CX 6 through CX 13 were admitted without objection (TR. at 22-23). CX 5 was removed prior to submission. (TR. at 22). Employer submitted six exhibits, EX 1 through EX 6, which were admitted without objection. (TR. at 23). The parties submitted one joint exhibit, identified as JX 1, which was admitted. (TR. at 22). The record was held open for sixty days for briefs. An extension to this time was granted and the record closed on September 17, 2002.

The findings and conclusions which follow are based on a complete review of the record in light of the argument of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUES

The following issues are disputed by the parties:

1. Whether or not a position as dock foreman whose work opportunities are established through a rotation list based upon seniority constitutes suitable alternate employment or sheltered employment?

2. Whether or not a claimant is entitled to temporary partial disability benefits when his actual wages do not show a loss of wage earning capacity and the employment is based upon a rotation list of which employer has complete control of claimant's position?

3. Whether or not Claimant is entitled to a *de minimis* award when his injury is not yet permanent?

STIPULATIONS

At the hearing, Claimant and Employer stipulated that:

1. That an employer/employee relationship existed at all relevant times;

2. That the parties are subject to jurisdiction of the Longshore and Harbor Workers' Compensation Act;

3. That the claimant sustained an injury arising out of and in the course of his employment on September 21, 2000 and October 31, 2000;

4. That a timely notice of injury was given by the employee to the employer;

[1] EX - Employer's exhibit; CX- Claimant's exhibit; and TR - Transcript.

5. That a timely claim for compensation was filed by the employee;

6. That the employer filed a timely First Report of Injury with the Department of Labor and a timely Notice of Controversion;

7. That the employer provided the claimant with medical services as required by 33 U.S.C. 907 (1994);

8. That the average weekly earnings of the claimant at the time of injury was $1,634.46 and his compensation rate for temporary total disability would be $933.82;

9. That benefits have been paid to the claimant as set forth in the Court's previous Order of May 28, 2002;

10. That from April 5, 2002 through June 15, 2002, inclusive, claimant has earned $17,868.01 exclusive of container royalties and holiday and vacation pay;

11. That claimant averages $341.49 per week from payment for container royalties and holiday and vacation pay;

12. That from April 5, 2002 through June 15, 2002, inclusive, claimant has worked 177 standard hours, 230.50 overtime hours and 35.50 double time hours;

13. That since April 5, 2002, claimant has not been released to return to the full spectrum of his regular and usual employment due to his work injury.

(JX 1).

DISCUSSION OF LAW AND FACTS

Claimant has been a member of the International Longshoreman Association for twenty-five years. (TR. at 24). Prior to his injury, Claimant performed many jobs on the waterfront, including: hustler driver, tow motor driver,[2] general cargo,[3] lasher[4] and dock foreman. (TR. at 25). Claimant described hustler driving as follows:

[2] A tow motor is a forklift, with hard rubber tires and no suspension. (TR. at 26).

[3] Claimant testified that work in general cargo consists of loading and unloading containerized cargo out of trucks and rail cars. He stated that, at the freight station, you would load freight on top of flatbeds and chain or lash them down. Lifting was required. (TR. at 25).

[4] Claimant described work as a lasher as using thick heavy rods to lash a box to the deck of a ship. (TR. at 35-36).

> Hustler driving is a one-seater truck that's only used for the terminal. It can't go outside the terminal. It has steps that you have to climb up on, little small doors to come out of. You have to bend over to get out the doors. It has no suspension except for little air bags that – in between the chassis and the truck itself. It has an air suspension seat on it. You– you jockey around the terminal, getting a chassis or getting a box, taking it to the ship or taking the box from the ship to the field out. You have to hook up to a chassis. You have to hook up to boxes that weigh 26, 30 tons. Sometimes the boxes are so low you have to slam into them to get the box. When you go underneath the crane sometimes the crane will misjudge and slam the box on you or when they go down to pick the box up, they'll slam the bar on the box to rock you. There's potholes all over the place.

(TR. at 26-27). Claimant also described his job as dock foreman. He stated that he is in charge of a group of workers on the dock, and it is his responsibility to make sure the boxes are in order and on the ship to the "fastest capacity and efficiency." (TR. at 27).

On September 21, 2000, Claimant was injured while working as a hustler driver. (TR. at 27). Claimant described this incident:

> I – either a box got added on, or it got left off or bringing it down to the ship, which is what a stager does. He brings the boxes down so the other men don't have to run down all over the terminal and bring the boxes down and possibly be late. I went to fetch this box and I back underneath it. It was an over high. When I raised the box up I went outside the door. I hooked up my air lines. When I came back in, I always pushed my air release to make sure that the air lines that you hook up do not leak, especially if you're pulling an over high or an extremely heavy box. Mine was not leaking. So, when I went to go sit down in my seat and turn around to face the window to drive the thing to the ship, the seat fell apart, which catapulted me into the windshield. Then, once it catapulted me into the windshield, it threw me into the floor which put my butt – excuse me– on the floor, my legs up in the steering wheel where the seat went to, and my head hit up against the side of the hustler inside.

(TR. at 27-28). His treating physician has been Dr. Morales. (TR. at 28). Since October 20, 2000, Claimant has been under light duty restrictions and has been working jobs offered by Employer. (*Id.*).

Claimant described the assignment of work in the foreman position as a rotation list. He stated that there were four "40-hour foremen[5]" who got called to work first. After that, Employer moves down the list. Every day the work starts with the 40-hour foremen and the list is worked down until there is no more work to be given out. (TR. at 28-29).

[5] A "40-hour foreman" was described by Employer's representative as a guarantee that if these foreman were not to make 40 straight time hours a week, Employer would pay the difference. (TR. at 46). He also testified that the four 40-hour foremen always make their 40 hours, and the policy really just serves to give them the first chance to get any job they want. (TR. at 46-47).

The foreman position has a liberal leave policy. (TR. at 41). When a foreman wants to be off for a day, he merely marks his name off the list for that day on a calendar that is kept on the supervisor's door. (TR. at 41). When people mark on the calendar that they want leave, they are taken out of the rotation and whoever is below them in the rotation moves up. (TR. at 42). According to Claimant, prior to the Parker Memorandum, dated May 17, 2002 and discussed *infra*, there did not seem to be any problem in who you called to take your place when you did not want to work a job. The Parker Memorandum, however, stated that when employees want to be relieved they are to go through the rotation list. (TR. at 41). Claimant stated that the phone list "only came out because of this situation. I had never received a phone list on foremans that I need to go down a rotation." (TR. at 41). Employer describes the foreman rotation list and leave policy process similarly. *See* discussion *infra*.

Since October 20, 2000, Claimant has only been able to work in the position of foreman. (TR at 30). In September of 2000, Claimant was eleventh on the rotation list for foremen. (TR. at 29, 35). On April 28, 2002, Claimant was switched to the number five position on the list. (TR. at 29-30). Claimant agreed that some people have dropped off the list for reasons such as illness, death in the family, or being terminated. (TR. at 35-36). In addition, some people on the list run with their gangs as well as perform dock foreman work. (TR. at 39). He further testified that Dr. Morales took him off the dock foreman job from February until late March, which accounts for a drop in hours. (TR. at 38). In addition, Claimant took time off in April, May and June. (TR. at 42). The job as dock foreman pays a higher rate than the general longshoreman job. (TR. at 38-39). The job of foreman is not a union position. (TR. at 30).

Claimant testified that he is unable to return to his other jobs, such as tow motor driver, hustler driver, general cargo worker and lasher. (TR. at 32). He explained:

> Well, I get jarred and beat around in the hustler. There are a lot of potholes. I'm just unable to do that. The tow motor job, I had to climb– when I went down in the hold of a ship, I had to climb a vertical, which is straight up and down, right, ladder, probably 30 feet down in the hold to work plywood and beams and stuff like that, which they don't have that many beam boats no more. And the freight is uneven, so it rocks me real hard. You have to slam the freight to get underneath it sometimes. There's a lot of jarring and jostling going on constantly.

(TR. at 32). He also testified that he could not be a lasher or work in general cargo anymore because he has difficulty lifting and holding heavy rods. (TR. at 33). He described lashing as:

> You have to hold [the rods] up in the air and study these rods that are three high, two high rods, and lash them to a little small hole in a box. And then you got to hold them out so that we can put a lashing rod on them and tighten down the lashing rods. There's grease from the cranes all over the place, or there's turnbuckles. There's pins that the boxes have to set on.

(TR. at 33). He clarified that he was only doing this type of job when he could, as he had a 50 pound lifting restriction prior to his injury in 2000. (TR. at 34).

Subsequent to the hearing, Claimant submitted an affidavit, which was admitted as CX 14. Claimant's affidavit states:

> 1. That since the hearing before the Administrative Law Judge Huddleston in the above referenced matter, two Ceres foreman in the rotation before me have retired. Those foreman are Henry Wall and Thomas Hopkins.
>
> 2. That instead of moving me from fifth in the rotation to third in the rotation, the employer has moved three individuals who were lower down the rotation in front of me. Those individuals are Mike Sink, Carla Pugh, and Gunney Harris.[6]
>
> 3. Therefore, instead of moving from number five in the rotation to number three, I have actually moved from number five in the rotation to number six.
>
> 4. That it has been recently discovered that a fourth individual will be moved in front of me in the upcoming weeks.

(CX 14).

Testimony of William Parker

Mr. William Parker is Employer's General Manager, which means he oversees the day-to-day operation of the company. (TR. at 44-45). That includes working with and assigning foreman. (TR. at 45). Mr. Parker testified that the foreman job that Claimant performs is a regular position with Employer. (TR. at 35). In addition, the position of foreman is important to Employer, and if Claimant did not do it, someone else would have to. (TR. at 46). For the most part, the foreman position is one in which stevedoring companies in the Tidewater area use in running their gangs when loading and unloading ships. (TR. at 46). On container vessels, two foremen per gang are used, and for Employer, ninety-eight percent of work involves containers. (TR. at 46).

Mr. Parker described the rotation system much as Claimant did. *See* discussion *supra*. He testified that the 40-hour foremen get called first and then the additional part-time foremen who are placed on a rotation list. He testified that "for the most part" they go through the rotation list from top to bottom and assign jobs as needed. (TR. at 47). Once the day and night shifts end, they go back to the top of the rotation list and offer jobs to the people first on the list and if they do not take it, they offer it to the people further down on the list. (TR. at 47). Mr. Parker also testified that some of the foremen prefer to run with their gangs, rather than run as a foreman. (TR. at 47). Others on the list have preferences, such as only wanting to work certain hours or days. (TR. at 48-49).

Mr. Parker also testified that Employer has had a forty percent increase in work since January 2002, which presumably has meant a corresponding increase in the need for foremen.

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[6] It is noted that had Claimant stayed in his original place on the foreman rotation list, these employees would have been ahead of him, as would W. Cochran.

(TR. at 50). However, Mr. Parker agreed that he had not checked what the increase or comparison in foreman hours has been, therefore he doesn't know if, or how much, the increase has effected them. (TR. at 57-58).

Finally, Mr. Parker pointed out that the fact that people are moved up in the rotation does not mean that they necessarily will work more hours, "[i]t all depends on the jobs that they get assigned, and how long the ships run for." (TR. at 51-52). *See also* (TR. at 51)(citing the example of Yvonne Pugh, who was, at that time, below Claimant on the rotation list and had more hours than Claimant). *But see* (TR. at 59)(testifying that if Claimant were in his normal place in the rotation in May, CX 13,[7] he would have worked between 147 and 111 hours, not the 194 that he worked in his new place). Finally, Mr. Parker stated that he was involved in the decision to move Claimant to number five on the foreman rotation list and that the reason he did so was "[i]n order to go ahead and get him more hours at – basically at the request of Mr. Montagna [Claimant's attorney]." (TR. at 63). When asked to look at CX 13, and pinpoint Claimant's position on the list, Mr. Parker testified that prior to 2002, Claimant would have been between Mr. Cochran and Mr. Wuth. Since 2002, Claimant has been between Mr. Hopkins and Mr. Horton. (TR. at 59). Mr. Parker also testified that, but for the move, Claimant would be in the slot listed as W. Cochran on CX 13. (TR. at 52).

Parker Memorandum

On May 17, 2002, Mr. Parker issued an interoffice memorandum to all foremen regarding "foreman issues." In pertinent part the memo stated:

> A number of people have voiced their displeasure over the John Hall situation. This was a company decision which was made in the best interest of the company. This may be difficult for some to understand but it was a necessary move. Once John's restrictions are removed by his treating physician he will be moved back to his original position in the "foreman rotation". If this is unacceptable to anyone, let me know and we will remove you from the foreman list.
>
> If you do not want to work a particular day or night you need to let Greg know so you will not be run. Recently, individuals have taken jobs and then called in a replacement. Although this is acceptable in [sic] should not be common practice.
>
> If you find you're on a job and need to find a replacement, you are to use the people on the Ceres foreman list first before using an "outside" foreman. You should also attempt to use the individual highest on the list that does not have a job. Attached is a list of foremen and where they stand in rotation. Also attached is a phone list. ...

(CX 11-1). Mr. Parker explained that his reason for writing this memo:

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[7] The hours listed on CX 13 are exclusively foreman hours, so other hours earned with gangs would not be reflected. (TR. at 60). In addition, the exhibit does not reflect the days the people working asked off for or jobs opted out of. (*Id*. at 61).

> [W]e were having a lot of problems, a lot of complaints from the various foremen on how they were being relieved. It had been a word-of-mouth practice that you were supposed to go to the list of foremen, and whoever was top on the list and they had not had a job, you'd go to that individual and offer him the job. As you said, Henry Wall had started to arbitrarily take jobs which he gets any job he wants, and rather than keep the job, he was having his son come in and do the job instead... So the reason for writing the memo was to go ahead and stipulate to everybody and have everyone understand how they were to get their relief. Along with that, I had had some complaints from people about moving John up to the number five position, and I felt I needed to address that also, which I did in that same memo. The reason for the memo was for relief for the foremen.

(TR. at 53-54). He testified that Employer had moved people in the rotation prior to Claimant, for business reasons as well. (TR. at 54).

Employer also submitted a post hearing affidavit of Mr. Parker, admitted as EX 7, in response to Claimant's affidavit. In pertinent part, Mr. Parker's affidavit states:

> 1. On June 28, 2002, Ceres had four foremen who were guaranteed forty (40) hours. The four forty (40) hour foremen are the first foremen called off the Ceres rotation list for any foreman jobs followed by the other foremen identified on the rotation list entered into evidence before the Court.
>
> 2. That since the June 28, 2002, hearing two of the Ceres forty (40) hour foremen have retired.
>
> 3. Claimant, by counsel, had previously requested that the claimant's position in the rotation be advanced, which request was granted. Claimant then took the position at trial that his hours were "artificially inflated." To avoid such further allegations and accusations from the claimant two foremen with greater seniority were advanced to fill the vacated positions of the two forty (40) hour employees who had retired. Because of increased work, and an increased demand for foremen, a fifth forty (40) hour foreman position was created.
>
> 4. Claimant remains the first foreman to be called in rotation after the forty (40) hour foremen are called.
>
> 5. There are presently no plans to add an additional forty (40) hour foreman.
>
> 6. That the need for foremen at the Terminal remains high and the claimant, if he reports for work when called, would have more than enough hours to ensure that his wages are in excess of his pre-injury wages.
>
> 7. That for the months of June, July and August the claimant has asked for, and been granted, twenty-six (26) days off. No other foreman in the rotation has ask [sic] for so many days off.

> 8. That based upon the claimant's allegations of favoritism it was my position that the claimant remain as the first foreman called from the Ceres rotation after the forty (40) hour foremen.
>
> 9. That it has become increasingly clear that any decision made regarding Mr. Hall is going to result in an allegation of favoritism, as alleged at the hearing, or discrimination, as alleged in his affidavit.

(EX 7).

Medical Evidence

On April 2, 2002, Dr. Lawrence Morales was deposed. (CX 2). *See also* (CX 1)(Dr. Morales' curriculum vitae). Dr. Morales has treated Claimant since September 21, 2000. (CX 2.5). On September 21, 2000, Claimant presented to Dr. Morales with neck, shoulder, and back pain. Claimant told the doctor that he was working on a hustler that day and the seat collapsed, and the air pressure then blew him up. He told the doctor it was like an explosion under him. He treated him for an injury to his neck, right shoulder, right arm, and low back. (CX 2.6). Claimant also returned to Dr. Morales on October 31, 2000, after walking into a hole and reported neck and low back pain. (CX 2.7). Claimant was eventually released to work as a dock foreman, but not as a hustler (in the years 2000 or 2001). (CX 2.7-2.8). Dr. Morales stated that he did not release Claimant to his full duties, as a hustler driver:

> Because of the nature of the findings on the MRI that the repetitive jarring and pounding on an uneven surface, as he would experience as a hustler driver, would aggravate his low back.

(CX 2.8). Claimant also suffers degenerative disk disease and arthritis. (CX 2.8-2.11). Claimant saw Dr. Morales through the entire year of 2001 at various intervals, and that entire time, he was restricted to the work of a dock foreman. (CX 2.12). He gave consistent complaints of lower back pain. (*Id*.). Claimant also had an altered, antalgic gait, and complained of difficulty bending, stooping, prolonged standing and prolonged walking. (CX 2.12-2.13). Dr. Morales stated that he based his 2001 restrictions upon the patient's complaints, the physical examination, and the MRI findings. (CX 2.13).

In early 2002, Dr. Morales released Claimant to return to work as a hustler on a trial basis. (CX 2.16). Dr. Morales clarified that the weight restriction to Claimant's wrist, of not lifting more than 50 pounds, was only to one arm or one wrist. (CX 2.16). However, Claimant is also under a 50 pound weight lifting restriction for his back. (CX 2.17). Dr. Morales stated that he had personally driven a hustler on Employer's property. (CX 2.17-18). He stated that the reasons behind his restriction of no hustler driving was based upon:

> It is not the hustler which is the problem. The hustler is a vehicle, and the vehicle goes forwards and back and does whatever it does. However, there are two surfaces that can be driven over, a smooth, even surface and a surface which is irregular, rough, and uneven. And this is more or less the surface that we're

> dealing with that I see and had an opportunity to see many years ago. It's the constant jarring and repetitive up-and-down motion that impacts on the spine over a period of time which will have a deleterious effect on the low back by the repetitive nature of the jarring, not so much of the hustler but of the road.

(CX 2.19). In addition, a large container placed on the chassis of the hustler, placed in a hard fashion, causes jarring, which Claimant should not be exposed to either. (CX 2.20).

Dr. Morales also discussed Claimant's two MRIs, on November 5, 2001 and October 11, 2000. (CX 2.21-2.23). He opined that the three conditions set forth in the MRI reports showed an exacerbation of a preexisting condition, and that during the interval between the first and second MRI that substantial deterioration occurred. (CX 2.23). He stated, however, that, Claimant will get better than what he is at the very moment and that he is capable of working as a foreman. (CX 2.26). On April 1, 2002, Dr. Morales gave Claimant a work restriction form that stated that he could return to restricted duty and continue with dock work only. (CX 9.1).

In an independent medical evaluation dated March 26, 2002, by Dr. DiStasio, his recommendations stated:

> 1) I feel he is fit for full duty for hustler driver, lasher, crane operator, forklift operator, and groundsman, top loader/reach stacker operator with respect to the injuries sustained on 2/28/02. Specifically, these are his cervical and lumbar strain as well as exacerbation of his underlying cervical and lumbar degenerative disc disease.
> 2) I have requested he be evaluated by a neurologist for evaluation of his headaches.
> 3) The greatest issue to be addressed here is this patient's underlying cervical and lumbar degenerative disc disease. I expect with the performance of his duties as a hustler driver with frequent vibration and the significant torsional and compressive forces placed upon his degenerative spine condition that many of these duties are not ideal for his current physical status. Simply put, I expect that if he continues to work as a hustler driver, we will see frequent exacerbations of his underlying cervical and lumbar degenerative disc disease. Clearly, the evidence of progression of his lumbar disc changes on MRI during a period of light duty/modified duty show that this condition is expected to worsen even without the rigors of his normal duties. My recommendations are that he not return to the hustler driver position for any significant length of time. His permanent duties should be based on a thorough functional capacity evaluation.

(CX 7.3).

Suitable Alternate Employment

It is undisputed that Claimant has a temporary work-related disability and that he can not return to his job as a hustler driver. Accordingly, the burden shifted to employer to establish the availability of suitable alternate employment. *See New Orleans (Gulfwide) Stevedores, Inc. v.*

Turner, 661 F.2d 1031, 1042-43 (5th Cir. 1981). The Board has previously recognized that a job in employer's facility may constitute evidence of suitable alternate employment if the job is tailored to claimant's medical restrictions and the tasks performed are necessary and profitable to employer's business. *See Peele v. Newport News Shipbuilding and Drydock Corp*., 20 BRBS 133 (1987); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986).

In the instant case, Employer has provided Claimant with the position of dock foreman, a position within their facility which Claimant worked part-time prior to his injury. The position of foremen is within Claimant's medical restrictions. (CX 2.26). Claimant has not alleged that his work as a dock foreman causes him physical pain or is difficult for him to perform. It is necessary and profitable to Employer's business. (TR. at 35 & 46). Moreover, it is not a position created for Claimant but one which most stevedoring companies in the area make use of and existed within the Employer's organization prior to Claimant's injury. (TR. at 46). In addition, numerous other employees who work for Employer do the same work. (*Id*.). Therefore, Claimant's position as dock foreman does constitute suitable alternate employment and is not considered sheltered employment. As Claimant is seeking a temporary partial award not covered by the schedule, the award will be based on the difference between Claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. § 908(c)(21)(h); *Richardson v. General Dynamics Corp.*, 23 BRBS (1990); *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4, 6 (1988).

Wage Earning Capacity

Section 908(h) of the Act provides:

> The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section and under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: provided, however, that if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interests of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend in the future.

33 U.S.C. § 908(h). The Board has held that the party that alleges that the actual wages do not fairly and reasonably represent the claimant's earning capacity has the burden of establishing that the wages are not a fair and reasonable representation and must show an alternative, reasonable wage earning capacity. *Avondale Shipyards, Inc. v. Guidry*, 967 F.,2d 1039 (5th Cir. 1992); *Randall v. Comfort Control, Inc.*, 725 F.2d 791 (5th Cir. 1984); *Burch v. Superior Oil Co.*, 15 BRBS 423, 427 (1983).

In determining whether the employee's actual post-injury wages fairly and reasonably represent his wage-earning capacity, relevant considerations include the employee's physical

condition, age, education, industrial history, and availability of employment which he can perform post-injury. *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225,18 BRBS 12 (CRT)(4th Cir. 1985), *aff'g* 16 BRBS 282 (1984); *Randall,* 725 F.2d at 791, 16 BRBS at 56 (CRT); *Devillier v. National Steel & Shipbuilding Co.,* 10 BRBS 649, 660 (1979). Additional factors include beneficence of a sympathetic employer, the claimant's earning power on the open market, whether the claimant has the seniority to stay in the job, and any other reasonable variables that could form a factual basis for the determination. *Burkhardt v. Bethlehem Steel Corp*., 23 BRBS 273 (1990).

Claimant argues that his actual wages do not fairly and reasonably represent his true wage earning capacity. He asserts that the Employer has advanced him on the foreman rotation list, which is typically based upon seniority, in order to artificially inflate his hours and therefore wages. *See generally* Clmt's Br. Instead, Claimant argues that his wage earning capacity should be based upon an average of his earnings from October 2000 through April 27, 2002, as he feels that is a more accurate reflection of his wage earning capacity. (*Id*.). As additional evidence, Claimant points to the Parker Memorandum which states that once Claimant's restrictions are removed, he will be moved back to his original position in the foreman rotation. (*Id*.).

Employer asserts that the foreman position is suitable alternate employment, not sheltered employment, for Claimant. (Emp. Br. at 2). Employer states that it was a "business decision" to raise Claimant on the rotation list and that, regardless, location on the list does not necessarily effect income. (*Id*.). *See also* (*Id*. at 13)(discussing and comparing Yvonne Pugh's earned hours to those of Claimant). Claimant's move up the rotation list was based upon a request by Claimant's attorney, according to Employer. (*Id*. At 10). Employer also contends that the wages of all foremen have increased due to a forty percent increase in business since the beginning of 2002. (*Id*.).

It is undisputed that Claimant is physically capable of performing the job of foreman and that the job is suitable for Claimant. (CX 2.26). The next issue is the system for assigning foreman jobs and Claimant's place in that system. According to the General Manager, Mr. Parker, and Claimant, the rotation list is based upon seniority. Admittedly due to his injury and work restrictions, Claimant was bumped ahead of more senior employees, apparently at the request of his attorney, and will be moved back to his original position when his restrictions are removed. *See* (CX 11)(Parker Memorandum stating that Claimant would be returned to his original position once his restrictions were removed); (TR. at 63)(Mr. Parker stating that Claimant was moved on the rotation list to get more hours at the request of his attorney). Therefore, while Claimant's employment as a dock foreman is not sheltered employment, his place on the seniority list is, admittedly, at the beneficence of a sympathetic employer. Claimant's industrial history in the position of foreman indicates that his true position in the foreman rotation is his previous one, between Mr. Cochran and Mr. Pugh. This is also indicated by the Parker Memorandum, which states that Claimant will return to that slot. (CX 11). Therefore, I find that Claimant's advanced position on the seniority list for foreman work does not provide a fair and reasonable representation of his wage-earning capacity. Since Claimant's actual wages do not fairly establish his wage-earning capacity, the court must determine his wage-earning capacity.

Claimant has presented no evidence regarding his earning power on the open market,

instead urging the court to use his wages from October 2000-April 2001 as a guide to establishing his wage-earning capacity. This seems unfair, however, in that by all accounts, Employer's business has increased and unrelated changes have occurred on the seniority list. The increase in business occurred in January 2002. (TR. at 50). Therefore, any wages must be considered from that point. According to Mr. Parker's post-hearing affidavit, two of the forty (40) hour foremen have retired, moving everyone up two slots. (EX 7). In addition, a fifth forty (40) hour foreman was added. (*Id.*). Examining the list provided by Claimant, CX 10,[8] and the testimony of Mr. Parker regarding Claimant's place in the rotation, but for his injury Claimant would be in the position of W. Cochran. (TR. at 52, 59). According to Claimant's post-hearing affidavit, Mike Sink, Carla Pugh, and Gunney Harris were moved up the rotation list, ahead of him. (CX 14). Considering this, I find that Claimant's current accurate wage-earning capacity is that of his original slot, between Mr. Cochran and Mr. Pugh.

Given the information provided, I find that the most reasonable and fair wage for Claimant should be based upon an approximation of his range of hours and corresponding wages (standard, overtime, double overtime), and the hours he would have potentially worked in his previous slot, which will be based upon W. Cochran's hours working exclusively as foreman. As the information offered just gives the hours from January 1, 2002 through June 2, 2002, Claimant's wage earning capacity will be based upon W. Cochran's hours for that time period, as Mr. Parker testified that but for his injury that would be Claimant's position. (TR. at 52). An average of W. Cochran's hours shows that he earned 94 hours in January, 128 in February, 208 in March, 149 in April, and 147 in May. Dividing each of these hours by four, the averages are 23.5 hours per week for January, 32 hours per week for February, 52 hours per week in March, 37.25 hours per week in April, and 36.75 hours per week in May. Averaging all of these months together, shows an average of 36.3 hours per week (181.5/5). According to Claimant's pay stubs, he works a mixture of regular, or standard, time, overtime, and double time. (CX 12); (EX 1). Based upon an average of his pay and hours for those months, his pay rate is established at approximately[9] $ 38.19(381.88/10). Therefore, Claimant's average weekly wage earning capacity should be $1,386.30 (36.3 x 38.19). Claimant's average weekly earnings at the time of his injury was $1,634.46, resulting in a wage earning capacity loss of $248.16 (1,634.46-1,386.30).

Notwithstanding the finding that there is a loss of wage earning capacity, payment of compensation while the Employer's beneficence places Claimant higher on the seniority list than he would otherwise be placed, would result in double recovery for the Claimant. Therefore, I also find that the Employer should be permitted to take credit for the wages paid against compensation due, for any period subsequent to April 5, 2002, that the Claimant's actual post-injury wages fall

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[8] The phone lists provided to foremen along with the Parker Memorandum lists the foremen in their seniority rotation list. The list is as follows: H. Wall, L. Tysor, S. Moulton, T. Hopkins, J. Hall, Jr., W. Horton, M. Sink, G. Harris, Y. Pugh, W. Cochran, M. Wuth, M. Veal, etc. (CX 10). Of course, the list has had unrelated changes since the hearing, as described *supra*.

[9] As no information concerning Claimant's hourly wage was provided, the pay stubs submitted (CX 12) were analyzed as follows: gross amount/the total number of hours worked. The wages per hour from each check then were averaged together: (38.61+38.67 +43.81+32.91+38.18+35.60+40.71+39.04+36.85+37.50)/10. As Claimant typically worked a range of straight, overtime and double overtime hours, the type of hours were not separated out but rather averaged together to get the average weekly wage.

below $1551.74.[10]

De Minimis Award

The Claimant had argued, in the alternate, if there was no loss of wage earning capacity, that a *de minimis* award should be issued. However, Claimant suffers a *temporary*[11] disability. A *de minimis* award is appropriate only when a permanent injury has occurred. A temporary injury is, by definition, not expected to continue, or not expected to continue at the same level, into the future. As Claimant's condition has not reached permanency, a discussion of a *de minimis* award for the probability of future economic harm is premature, even if it had been held that there was no current loss of wage earning capacity.

ORDER

Accordingly, it is hereby ordered that:

1. Employer, Ceres Marine Terminals, is hereby ordered to pay to Claimant, John Hall, temporary partial disability at the weekly rate of $165.44 ($248.16 X 2/3), commencing April 5, 2002, and continuing;

2. Employer shall receive credit for the wages paid against compensation due, for any period subsequent to April 5, 2002, that the Claimant's actual post-injury wages fall below $1551.74;

3. Employer is hereby ordered to pay all medical expenses related to Claimant's work related injuries;

4. Interest at the rate specified in 28 U.S.C.§ 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits and penalties, computed from the date each payment was originally due to be paid. See *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984);

[10] This amount is calculated as the sum of the current wage earning capacity ($1,386.30) and two thirds of the Claimant's loss of wage earning capacity $165.44 (2/3 X $248.16).

[11] The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. *See Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 235, fn. 5 (1985); *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 60 (1985); *Stevens v. Lockheed Shipbuilding Company*, 22 BRBS 155, 157 (1989). Where the medical evidence indicates that the claimant's condition is improving and the treating physician anticipates further improvement in the future, it is not reasonable for a judge to find that maximum medical improvement has been reached. *Dixon v. Cooper Stevedoring Co.*, 18 BRBS 25, 32 (1986). In the instant case it has been agreed that Claimant has not reached maximum medical improvement and that his condition is temporary.

5. Claimant's attorney, within 20 days of receipt of this order, shall submit a fully documented fee application, a copy of which shall be sent to opposing counsel, who shall then have ten (10) days to respond with objections thereto.

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RICHARD E. HUDDLESTON
Administrative Law Judge